80-1717

Office-Supreme Court, U.S.
FILED
APR 13 1981
ALEXANDER L. STEVAS,
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

READING INDUSTRIES, INC., *Petitioner,*

v.

KENNECOTT COPPER CORPORATION, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED*

I. Did the Court Err in Holding that the Principle of *Illinois Brick* Requires the Entry of a Summary Judgment on Grounds of Lack of Standing Where the Plaintiff, a Purchaser of Copper and a Competitor of Defendants in the Sale of Copper Fabricated Products, Was Admittedly Injured by the Condition of the Copper Market in Which Supply and Price Were Unlawfully Affected by Defendants' Conspiratorial Acts?

II. Did the Court Err in Utilizing *Illinois Brick* to Limit Standing in Antitrust Cases Only to Violations Where There Is a Direct Impact on Buyers or Sellers, Thereby Excising from the Antitrust Laws, Violations Involving Market Impact or Disruption Such as Conspiracies to Monopolize or Suppress Prices?

III. Should this Court Review the Misuse of *Illinois Brick* by the Second Circuit and a Number of Other Courts of Appeals and District Courts to Deny Standing to Plaintiffs Injured by Antitrust Violations Involving Market and Price Conspiracies?

IV. Does the Conflict Among the Circuits and the Different Results Within the District Courts Concerning Standing in Antitrust Cases, Which has Been Exacerbated by the Unjustified Interpretation and Application of This Court's Decision in *Illinois Brick*, Require Review by this Court?

V. Did the Court Below Err by Disregarding this Court's Rulings With Respect to Judicial Disfavor of Threshold Denial of the Right to Have Anitrust Issues Decided on the Basis of an Evidentiary Trial, not Summary Judgment, Where Plaintiff's "Status" as a Person Directly Injured by the Condition of the Market is Undisputed and the Remaining Question Is Whether Plaintiff's "Claim" Is a Factual Result of the Defendants' Violation?

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* Respondents include The Anaconda Company, Kennecott Copper Corporation, and Phelps Dodge Corporation (hereinafter Anaconda, Kennecott, and Phelps Dodge).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Reading Industries, Inc. (hereinafter Reading), respectfully prays that a Writ of Certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit is reported at 631 F.2d 10 (2d Cir. 1980). (reprinted as

Appendix A.) The Opinion of the United States District Court for the Southern District of New York is reported at 477 F. Supp. 1150 (S.D.N.Y. 1979). (reprinted as Appendix B.)

The order of the Court of Appeals denying Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* is set forth in Appendix C at 29a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 24, 1980.

A timely petition for rehearing and suggestion for rehearing *en banc* were denied by the Court of Appeals on December 29, 1980.

A petition for an extension of time to file this petition was filed on March 23, 1981. On March 24, 1981, Associate Justice Thurgood Marshall granted an extension of time, to April 13, 1981, to file this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

15 U.S.C. §1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. §2 provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . .

15 U.S.C. §15 provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust

> laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This Petition seeks review of the Second Circuit's decision affirming a summary judgment dismissing before trial petitioner's antitrust complaint, on the grounds of lack of standing. The complaint alleged that respondents had combined and conspired to suppress the price of domestically mined and refined copper and conspired to monopolize the market for the sale of such copper in violation of Sections 1 and 2 of the Sherman Act. Petitioner asserted standing "as a competitor of the . . . [respondents] directly injured by their conduct."[1]

Petitioner is a domestic company which purchases significant amounts of copper for use in its business. It is principally engaged in the manufacture of copper-fabricated tubing products of which copper is a major cost component. Petitioner directly competed with the integrated fabricating subsidiaries of respondents in the sale of copper-fabricated products.

Respondents are domestic companies fully integrated into all stages of mining, smelting, and refining of copper and the fabricating of copper products. Combined, they control over 90% of the domestic mining output, 59.8% of refining capacity, approximately 67% of smelting capacity, and 50-55% of total fabricating consumption.[2]

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[1] 631 F.2d at 12, Appendix A at 4a.

[2] *See,* certified record from below (hereinafter "Record"), Addendum to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, Report of Plaintiff's Economic Expert (hereinafter "Nathan Report") at 40-43, 46-47; Record, Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (hereinafter "Plaintiff's Opp. to S.J.") at pp. 81-82.

Copper is a homogeneous product. "The market for copper is a world market, and the price at which copper moves in any part of the world from any source, effects that market."[3]

When the law of supply and demand operates freely, "the various prices for copper in the . . . world [market] . . . will . . . always be in close relationship."[4]

From 1964-1970, respondents controlled the United States copper market.[5] The district court postulated that during this period respondents engaged in a six-year price-fixing conspiracy[6] in which they sought to and did suppress the price of domestic copper below market clearing levels.[7] The district court found, "Reading has come forward with evidence which does tend to support its contention that the defendants violated the antitrust laws, evidence which would suffice to defeat this branch of the defendants' motion even if the defendants had met their initial burden."[8] The Court of Appeals did not challenge the existence of this conspiracy and in fact added that during the period respondents "also restricted output."[9]

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[3] *See* Record, Plaintiff's Opp. to S.J. at pp. 389-392.

[4] *Id.* at p. 391.

[5] Respondents jointly exercised substantial control over the pricing and distribution of domestically-mined copper ore and domestically-fabricated copper products. *United States* v. *Amax, Inc.*, 402 F. Supp. 956 (D. Conn. 1975). *See also,* 477 F. Supp. at 1153, Appendix B at 11a.

[6] In a joint motion for summary judgment, respondents attempted to demonstrate that each of them had legitimate reasons to hold down the price of copper. "Despite the volume . . . of . . . [the] submissions on this point," the district court held respondents failed to establish "common independent motives" for their behavior. 477 F. Supp. at 1157, Appendix B at 19a.

[7] 477 F. Supp. at 1155, Appendix B at 16a.

[8] 477 F. Supp. at 1156, Appendix B at 18a.

[9] 631 F.2d at 14, Appendix A at 7a. This conspiracy to suppress prices had the practical effect of curtailing the development of supplies of new domestic copper. Record, Nathan Report at p. 106.

As found by the district court and "accepted by the . . . [respondents] (at least for purposes of . . . [their] motion [for summary judgment])",[10] the conspiracy created an artificial shortage of domestically mined copper[11] which caused the prices for copper from other sources to increase to artificially high levels.[12] In fact, the district court observed that although respondents did not agree with petitioner's assertion that copper prices "rose to higher levels than they otherwise would have had the . . . [respondents] not held their prices for refined copper low, . . . [the respondents] do not dispute it on this motion."[13]

As found by the Court of Appeals, Petitioner purchased its entire copper requirements at the artificially higher prices during the conspiracy period.[14] It had to do so because respondents refused to sell any of their domestic copper to petitioner despite its repeated attempts to effect such purchases.[15] The district court concluded, based on assumptions required for purposes of determining respondents' summary

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[10] 477 F. Supp. at 1155, Appendix B at 15a.

[11] 477 F. Supp. at 1154, 1155, Appendix B at 13a-16a.

[12] 477 F. Supp. at 1155, 1160, Appendix B at 16a, 27a.

[13] 477 F. Supp. at 1155, Appendix B at 16a. Nor was this fact disputed by the Court of Appeals.

[14] 631 F.2d at 11, Appendix A at 2a.

[15] The Court of Appeals incorrectly implied that Reading never attempted to purchase copper from respondents. 631 F.2d at 12, 14, Appendix A at 3a, 7a. The facts are otherwise. For a period of over five years petitioner requested and was consistently refused any supply of domestic copper from respondents. *See* Record, Excerpts of Depositions and Exhibits in Support of Defendants' Motion for Summary Judgment Vol. 1, Plaintiff's Answers to Interrogatory 21 (f). In fact, the reasons claimed in justification for the refusals — no allocations being made to new customers and output being proportionately distributed to historical customers — was for the first time in 1970 actually discovered to be false. Significant new customers were in fact added and allocations were not made in proportion to historical patterns. *See* Record, Nathan Report at pp. 92-93.

judgment motion and derived from petitioner's evidence tending to support the conspiracy, that petitioner had to and did pay more for the copper it purchased than it otherwise would have paid had respondents not suppressed domestic copper prices and restricted output.[16]

As a result, petitioner was seriously disadvantaged in its competition with respondents in the sale of fabricated products. Respondents priced these products on the basis of the conspiratorially fixed lower-priced domestic copper supplied by them to their fabricating subsidiaries.[17] Petitioner had to price accordingly. Therefore, while respondents' fabricating facilities were supplied by respondents at artificially low levels and sold low, petitioner had to buy at artificially high prices and was forced to sell low.[18]

The artificially inflated copper prices paid by petitioner directly resulted from respondents' conspiratorial activities.[19] The district court found that petitioner's injury "no matter how remote" was sustained by it "in the market" disrupted by the conspiracy "as a consequence of market interactions . . . to [respondents'] behavior. . . ."[20] In fact, the Court of Appeals specifically held that petitioner had status to sue under the antitrust laws since its injury was direct and "not . . . derived from harm to some other party more proximately related to the consequences of the alleged violation."[21]

Nevertheless, because the injury was deemed to have resulted from the effect on the relevant market of

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[16] 477 F. Supp. at 1155, Appendix B at 16a. *See also,* Court of Appeals' decision, 631 F.2d at 13, Appendix A at 5a, where the fact of causation is accepted but deemed "too remote to permit the imposition of liability."

[17] Record, Nathan Report at p. 87. *See also, U.S.* v. *Amax, Inc., supra* note 5.

[18] Record, Plaintiff's Opp. to S.J. at pp. 406-413; Record, Nathan Report at pp. 85-92.

[19] 477 F. Supp. at 1154, 1155, Appendix B at 13a-16a.

[20] 477 F. Supp. at 1160, Appendix B at 27a.

[21] 631 F.2d at 13, Appendix A at 5a.

respondents' unlawful acts, rather than from a direct course of dealings between petitioner and respondents, the Court of Appeals held that petitioner lacked standing to sue; that petitioner should be denied an opportunity to prove its case.[22] It supported its decision by reference to what it viewed as the "broader significance" of this Court's decision in *Illinois Brick* v. *Illinois,* 431 U.S. 720 (1977).[23]

Reiterating the standard used (but not consistently) by the Second Circuit in some of its prior decisions, that a plaintiff must demonstrate it was in the "target area" of the conspiracy, the Court of Appeals, in effect, confined the scope of the antitrust laws to "privity" cases where a plaintiff claims damages as a directly competing seller or as the first purchaser from a conspirator.

Petitioner submits that proof of the fact that its injury was caused by respondents' unlawful conspiracy is neither complex nor intricate[24] but, in any event, submits that the asserted complexity of "tracing" the causal chain is no reason to deny it an opportunity to prove causation; that the antitrust laws should not be subject to an exception in favor of conspirators who are able to injure competitors and competition by manipulation of price and supply. Petitioner also submits that those who, like petitioner, as the Court of Appeals concedes, "assert standing as a competitor of the defendants, directly injured by their conduct"[25] should not be denied by

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[22] 631 F.2d at 14, Appendix A at 7a.

[23] 631 F.2d at 14, Appendix A at 7a.

[24] The court below maintained that the causal chain was allegedly complex despite uncontested evidence to the contrary. Copper market analysts, economists observing the market during the period, government officials responsible for copper requirements, and respondents themselves all knew of the simple and real relationship between the suppression of domestic copper prices at artificially low levels and the consequent increasing of other copper prices to artificially high levels. *See* note 30 *infra* at p. 11. *See* Record, Plaintiff's Opp. to S.J. at pp. 389-405.

[25] 631 F.2d at 12, Appendix A at 4a.

summary, threshold judgment an opportunity to prove causality.

Finally, petitioner submits that this Court should review the present case in order to prevent and terminate a massive and pervasive weakening of the antitrust laws, particularly in favor of entities who, like respondents, are large and powerful enough to secure their monopolistic or repressive objectives by collusive market operations which avoid the simple techniques of direct impact upon those with whom they deal as buyers or sellers.[26]

The following legal considerations require this Court's review:

1. The decision below, like the post *Illinois Brick* decisions in other district and circuit courts, *see, infra,* has seriously misconstrued and misapplied this court's decision in *Illinois Brick* by broadening it to a general rule of antitrust standing.

2. The scope and effect of *Illinois Brick* requires clarification with respect to standing and its use to excise from the antitrust laws, violations which involve market impact and disruption rather than impact on direct purchasers from conspirators.

3. In general, this Court should review and clarify the standards governing standing to sue in antitrust cases. Previously, this Court has not ruled on this issue. It has denied *certiorari* in many cases previously presented. In the interim, conflicts among the circuits and diversity in holdings of the district courts have become rampant, as we shall show, encouraging forum shopping and leading to improper and destructive variations in results.

4. The conflicts among circuits and the diversity in district court holdings as to the stated standards of antitrust

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[26] Here, defendants sold their entire output to subsidiaries and select, favored customers. *See*, Record, Nathan Report at pp. 117-124; Record, Plaintiff's Opp. to S.J. at pp. 278-287.

standing and the exacerbation of those conflicts by reason of the misapplication of this Court's decision in *Illinois Brick* require review by this court.

5. The decisions below require the reaffirmation by this Court with respect to judicial disfavor of threshold denial of the right to have antitrust issues relating to causation and injury decided only on the basis of an evidentiary trial.

REASONS FOR GRANTING THE WRIT

I. On A Fundamental Question Of Antitrust Law, The Decision Below Has Misconstrued And Misapplied This Court's Decision In *Illinois Brick* By Broadening It To A General Rule Of Standing.

This Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977) cannot and should not be extended to deny standing for antitrust violations.

The rationale of the Second Circuit, sanctioning a conspiracy which concededly caused anticompetitive injury to copper purchasers and fabricators and expanded the respondents' monopolistic control, grants a license to dominant conspirators to suppress competition.

The Second Circuit creates this anomaly by invoking the spirit of *Illinois Brick.* The Circuit admittedly extends the decision beyond its direct holding to what it believed is *Illinois Brick's* "broader significance" in foreclosing suits except in cases of direct injury to competitors. *Reading* establishes a rule of law which denies standing to any antitrust plaintiff if proof of injury is either allegedly complex or subtle.

This use of *Illinois Brick* is unwarranted.[27]

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[27] *See, Zenith Radio Corp.* v. *Matsushita Electrical Industrial Co.,* 1980-2 Trade Cases ¶ 63,418 (E.D. Pa. 1980); *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979); and *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 497 F. Supp. 218 (C.D. Cal. 1980), which have specifically noted *Illinois Brick* does not extend to standing. *But*

This Court deliberately and specifically did not address the standing issue in *Illinois Brick, supra.* Instead, it determined that the reasons for not allowing a defensive use of pass-on as set forth in *Hanover Shoe, Inc.* v. *United Shoe Machinery Co.,* 392 U.S. 481 (1968) apply equally to a plaintiff's offensive use of pass-on. It stated:

> "Because we find *Hanover Shoe* dispositive here, we do not address the standing issue except to note . . . that the question of which persons have been injured by an alleged overcharge for purposes of §4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing for damages under §4." *Illinois Brick, supra,* 431 U.S. at 728, n.7.

The Court reasoned that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." *Illinois Brick, supra,* 431 U.S. at 730. The Court was also concerned that:

> " . . . the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff." 431 U.S. at 732-33.

Therefore, the essence of the Court's opinion in *Illinois Brick,* was the establishment of equal treatment for both plaintiffs and defendants with respect to the permissibility of pass-on in a vertical chain of distribution.

However, none of the elements with which *Illinois Brick* was concerned are present in this case.

Since there is no chain of distribution, there is no "difficulty of reconstructing pricing decisions of intermediate pur-

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compare, Mid-west Paper Products Co. v. *Continental Group, Inc.,* 596 F.2d 573 (3d Cir. 1979), which applied *Illinois Brick* as a rule of standing but specifically excluded the type of factual situation involved here.

chasers at each step in the chain. . . ." *Illinois Brick, supra* at 733 n.13.

The only purchasers involved and affected are copper fabricators which purchased copper for their own use at market prices disrupted by the conspiracy. No reconstruction or construction of the pricing decisions of intermediaries is either necessary or feasible in calculating petitioner's injury. Competition was not injured through direct dealings, but by conspiratorial rigging of the market in which petitioner purchased. Causation resulted from the effect of the conspiracy on the market.

The price at which copper was traded and purchased by petitioner in response to supply and demand was set by the market,[28] which was rigged by respondents' conspiracy. There were no intermediate purchasers in a vertical chain of distribution in the sale of copper to petitioner. The sources of market traded copper are merely physical conduits through which copper is moved from the place of sale to the place of purchase. It was the supply-demand set market price which petitioner had to pay for copper and it was that market price which was directly inflated as a result of the respondents' conspiracy.

Petitioner's injury was neither "conjectural," "attenuated," nor "intricate."[29] Rather, the injury was the simple and realistic consequence of the conspiracy on the market.[30]

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[28] The role of copper merchants and dealers is indistinguishable from that of brokers dealing on a recognized stock exchange. Just as the exchange market and not the brokers, sets the price of securities sold by the brokers, the open copper market, and not the dealers and merchants, establishes the open market price of copper.

[29] 631 F.2d at 14, Appendix A at 7a.

[30] The factual interrelationship between the effects of the conspiracy and copper market prices was not only unchallenged but in fact admitted by respondents' officers and economist, in addition to independent government observers and other copper market industry members. *See* Record, Plaintiff's Opp. to S.J. at pp. 389-405.

Certainly the decision in *Illinois Brick* should not be extended as a general principle of standing to control this or other market disruption cases.

II. The Decision Below Excises From The Antitrust Laws Private Remedies For Violations Which Previously Have Been Prohibited By This Court.

The *Reading* test of "tracing" or "privity" for determining antitrust standing, excises entire forms of violations from private enforcement of the antitrust laws which this Court had previously found to be prohibited. These include injuries caused by conspiratorial market manipulation rather than through direct relationships.

The violations alleged by petitioner are not susceptible to standing analysis under a "tracing" or "privity" concept. The injury caused by these offenses arises from the offender's acts in controlling market prices and supply by tampering with price structures. The result is market distortion to serve conspiratorial purposes.

One of the oldest and fundamental principles of antitrust law is that "any combination which tampers with price structures is engaged in unlawful activity."[31]

This Court has held that:

> "Even though the members of . . . [a] price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." 310 U.S. at 221.

For example, in *Socony,* the interference was a conspiratorial buying program which contributed to a price rise and stability of gasoline spot markets and to increases in the regular price of gasoline sold in a geographic area of the

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[31] *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940).

United States. The fact that other factors may have also contributed "to that rise and stability of the markets" was found by this Court to be immaterial. 310 U.S. at 219. In any market movement, this Court noted, "forces other than the . . . power of the . . . [conspirators] normally would contribute to the price rise and the market stability." 310 U.S. at 219. However, it was held that insofar "as cause and effect are concerned, it is sufficient . . . if the . . . [acts of the conspirators] resulted in a price rise and market stability which but for them would not have happened." 310 U.S. at 219.

Any manifestation of market manipulation was unequivocally condemned by this Court because it was "implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." 310 U.S. at 223.

It was exactly this type of market interference by the artificial stimulus of respondents' conspiracy which occurred in this case. Respondents' conspiracy interceded in the copper market by tampering with one of the prices in the market, distorting the remainder and preventing "the determination of . . . [all] prices by free competition alone." 310 U.S. at 223.

Reading eliminates these principles and violations from private enforcement under the antitrust laws. A single rule of tracing or privity is neither helpful nor justified in market manipulation cases. Prior to *Reading,* antitrust injury in such cases was assessed by judging the consequences of the conspiracy on the market in which the affected purchases are made, not by a simplistic attempt to trace a non-existent overcharge to a direct purchaser.

Certainly, in a case where the violation alleged is the maintenance of artificially low prices, as here, the *Reading* test for standing is illogical and unworkable. The maintenance of artificially low prices benefits the direct purchasers in a vertical chain of distribution.[32] The Third Circuit, in *Mid-*

[32] 477 F. Supp. at 1154, Appendix B at 13a-14a.

West Paper Products Co. v. *Continental Group, supra,* although misconstruing *Illinois Brick* by requiring a "tracing" test for determination of standing, nevertheless recognized that this approach has no application "where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct such as . . . monopolization." 596 F.2d at 585, n. 47.

As recognized in *Mid-west*, market analysis, rather than "tracing" or "privity," is necessary in cases alleging a monopolization violation.[33] In condemning such violations, courts have held and commentators have clearly stated that purchasers such as petitioner have standing under the antitrust laws to recover damages for the injuries sustained by them resulting from their having to pay higher market prices caused by conspiratorial behavior. *See,* Berger & Berstein, *An Analytical Framework for Antitrust Standing,* 86 YALE L. J. 809 (1977) and cases cited therein.

Therefore, to pigeonhole standing under the Sherman Act into "tracing" or "privity" in a vertical chain of distribution removes from the antitrust laws large areas of antitrust violations which depend upon different but well-established forms of market analyses previously utilized and recognized by this Court.

III. There Is A Long-Standing And Irreconcilable Conflict Among The Circuits And Diversity In District Court Standards On The Fundamental Question Of Antitrust Standing Which Has Been Exacerbated By Erroneous Applications Of This Court's Decision in *Illinois Brick* And Which Can Only Be Resolved by Further Action Of This Court.

This Court has never definitively ruled on the scope of antitrust standing. For approximately the last twenty years it has denied *certiorari* in numerous standing cases. As a result,

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[33] *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962).

there are fundamental conflicts among the Circuits and diversity in district court standards. The existing confusion on this issue has now been exacerbated by the actions of several Circuits, including the decision in *Reading*, in extending the rationale of *Illinois Brick* generally to deny standing in antitrust cases. Clarification by this Court is now essential.

Section 4 of the Clayton Act, 15 U.S.C. §15 (1973) grants a right to legal relief for violations of the antitrust laws to: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." A number of complex and conflicting tests have been utilized by the Circuits in their interpretations of the "by reason of" language.

Presently, three distinct and separate tests are applied to determine antitrust standing: "direct injury", "target area", and "zone of interest".

The nexus of the "direct injury" test is the relationship between the antitrust violator and its victim. Where the antitrust violator is separated from its victim by any intermediary, standing is generally denied. This test has been adopted by the First and Tenth Circuits.[34]

The "target area" test focuses on the relationship of the plaintiff to the area of the economy allegedly injured by actions of the defendants and has been adopted by the Second, Fourth, Fifth, Eighth, and Ninth Circuits. On some occasions, the Third and Seventh Circuits have also adopted a form of this test.[35]

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[34] *See, e.g., Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *Nationwide Auto Appraisers Serv., Inc.* v. *Ass'n. of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967); *Milvey* v. *John Hancock Mutual Life Ins. Co.*, 148 F. Supp. 299 (D. Mass), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

[35] *See, e.g., Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Int'l. Ass'n. of Heat and Frost Insulators* v. *United Contractors Ass'n.*, 483 F.2d 384 (3d Cir. 1973), *amended*, 494 F.2d 1353

The "zone of interest" test requires that a plaintiff demonstrate that the violator caused injury in fact and that the interest sought to be protected is arguably within the zone of protection of the antitrust laws. This test has been adopted by the Sixth Circuit[36] and utilized, in the past, in part by the Seventh Circuit.[37]

Each of the above three tests is only a general description of the standards which appear to have been adopted in principle by the Circuits. There are considerable conflicts, however, among the Circuits as to the manner in which each test is interpreted and applied.

For example, the "direct injury" test has been restrictively interpreted by the First Circuit to deny standing to plaintiffs who are not in direct competition with the antitrust violator even though they may have been in privity with the violator.[38]

The "target area" test has been applied in three distinct manners by the Ninth, Second, and Fourth Circuits, resulting, in effect, in three different tests. The Ninth Circuit uses a foreseeability "target area" standard and grants standing for injuries which are a foreseeable consequence of the defend-

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(3d Cir. 1974); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 545 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

[36] *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975).

[37] *Illinois* v. *Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom. Illinois Brick Co.* v. *Illinois*, *supra*.

[38] *See, Carroll* v. *Protection Maritime Insurance Co.*, 377 F. Supp. 1294 (D. Mass, 1974), *modified*, 512 F.2d 4 (1st Cir. 1975); *Robinson* v. *Stanley Home Products, Inc.*, 178 F. Supp. 230 (D. Mass.), *aff'd*, 272 F.2d 601 (1st Cir. 1959); *Milvey* v. *John Hancock Mutual Life Ins. Co.*, *supra* note 34; *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956).

ant's unlawful conduct.[39] To the contrary, the Second Circuit expressly rejects any element of foreseeability in its "target area" test and prior to *Reading*, held that a plaintiff not only must be within the target area, but that it, in fact, must be the very target itself of the alleged conspiracy.[40] In contrast to both, the Fourth Circuit "target area" test requires that the plaintiff establish it was proximately injured within the sector of the economy in which the violation threatened a breakdown of competitive conditions.[41]

As a result, similarly situated plaintiffs in different Circuits have been treated differently although supposedly the same tests are being applied,[42] and similarly situated plaintiffs

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[39] *See, In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *Twentieth Century Fox Film Corp.* v. *Goldwyn,* 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964) (establishing foreseeability aspect of Ninth Circuit's target area test); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Conference of Studio Unions* v. *Loew's, Inc., supra* note 35.

[40] *See, Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc., supra* note 35 (rejecting foreseeability aspect of Ninth Circuit's target area test). *See also, Long Island Lighting Co.* v. *Standard Oil Co.*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); *SCM* v. *Radio Corp. of America,* 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd,* 407 F.2d 166 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969).

[41] *South Carolina Council of Milk Producers, Inc.* v. *Newton, supra* note 35.

[42] Commentators have noted that application of the "direct injury" test has resulted in inconsistency in categorization of similarly situated plaintiffs and disagreement among and within the circuits as to whether similarly characterized plaintiffs have been directly injured. *See,* Berger & Bernstein, *An Analytical Framework For Antitrust Standing, supra* at 820-30 and cases cited therein.

Anomalous results flow from different Circuits' application of the "target area" test to similarly situated plaintiffs. *Compare, e.g., Hoopes* v. *Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967) with *Calderone Enterprises Corp.* v. *United Artists Theatre Circuits, Inc., supra at note 35; compare, Karseal Corp.* v. *Richfield Oil Corp., supra* at note 39, with *Billy Baxter, Inc.* v. *Coca Cola Co.*,

in different Circuits have been treated differently because different tests have been applied.[43]

This confusion has been exacerbated by the decision in *Illinois Brick*. Indicative is the current state of antitrust standing in the Seventh Circuit. In the case of *Illinois* v. *Ampress Brick Co.*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom. Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the Seventh Circuit combined a liberal application of the Sixth Circuit's "zone of interest" test with aspects of the Ninth Circuit's "foreseeable target area" approach. This Court reversed and held that indirect purchasers would be prohibited from recovering treble damages based on an offensive use of a pass-on theory but in doing so, specifically noted that it was not addressing plaintiff's standing to sue. 431 U.S. at 728, n.7.

Subsequently, in *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163 (7th Cir. 1978), the court, noting the problems in distinguishing between issues of antitrust injury and issues of antitrust standing, refused to decide which among the antitrust standing tests it would adopt.[44]

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431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), and *compare, Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) with *Fields Productions, Inc.* v. *United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd mem.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

[43] For example, *compare, Johnson* v. *Ready Mix Concrete Co.*, 318 F. Supp. 930 (D. Neb. 1970) (target area test) with *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) (direct injury test); *compare, Congress Bldg. Corp.* v. *Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957) (direct injury test) with *Calderone Enterprises Corp.* v. *United Artists Theatres Circuit, Inc., supra* at note 35, (target area test).

[44] In the absence of any direction from the Court of Appeals, district courts have applied conflicting and wholly new tests. *See, e.g., Juneau Square Corp.* v. *First Wisconsin Nat'l Bank*, 445 F. Supp. 965 (E.D. Wis. 1978) and *In re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979).

Similarly, the Third Circuit in *Mid-west Paper Products Co.* v. *Continental Group, Inc., supra*, in applying the principles of *Illinois Brick*, held that a plaintiff's injuries are too remote and thus not legally attributable to a defendant where tracing injury to the defendant would require complex economic analysis and where the objectives of the antitrust laws, in compensating victims of unlawful conduct, deterring violations, and preserving competition could be better served by suits brought by others.

The Second Circuit's decision in *Reading* has added to this muddle. In relying on *Illinois Brick* as establishing a general rule of standing, the Second Circuit now appears to require that a plaintiff not only be a target and within the target area of an antitrust violation, but, in addition, that its claims be capable of being easily traced to a violator with whom it is in privity.[45]

These are only a sample of the conflicts existing and newly created on this issue. Both courts and commentators have expressed utter frustration as to this morass.[46] The diversity of

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[45] District Courts have also applied *Illinois Brick* to preclude plaintiffs from standing. *See, Parkview Markets, Inc.* v. *The Kroger Co.*, 1978-2 Trade Cases ¶ 62,373 (S.D. Ohio 1978). *But compare, Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, *supra* note 27 (where the Court specifically denoted the motion before it an "Indirect Injury-Illinois Brick" motion was opposed to a standing motion and refused to follow *Parkview Markets, Inc.* v. *The Kroger Co., supra*, to the extent it denied plaintiff standing based on *Illinois Brick*.

[46] *See, e.g., Malamud* v. *Sinclair Oil Co., supra* note 36 (where the court abandoned both the "direct injury" and "target area" theories as inadequate); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir. 1973); *see also*, Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 22-31 (1971); Klingsberg, *Bulls Eyes & Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351, 353-55 (1971); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, *supra* at 840-45.

standards now aggravated by *Illinois Brick* can only encourage plaintiffs to forum shop, further erode the substantive protections of the antitrust laws, deter private enforcement, and foreclose vindication of legitimate claims.

IV. The Decision Below Is In Direct Conflict With Previous Supreme Court Decisions Regarding The Propriety Of Granting Summary Judgments In Antitrust And Other Complex Cases.

It is imperative that there be a reaffirmation of this Court's rulings with respect to the judicial disfavor of threshold denial of the right to have antitrust issues decided only on the basis of an evidentiary trial. The district court expressly did *not* grant summary judgment on the grounds of petitioner's "status," *i.e.,* its standing as an injured party. Rather, the Second Circuit affirmed the summary dismissal of the complaint on its view that Reading's claim was "too tenuous and conjectural for a valid causal finding of anti-competitive effect and damages."[47]

The question of "claim" involves findings of factual causation which can only be made by a jury and cannot be usurped by a court as a matter of law. To rule, as the Second Circuit did, that a plaintiff will not be allowed to prove causation where complexity and subtlety may be involved is an invitation to conspirators to devise complex schemes to violate the antitrust laws. Petitioner submits that the asserted complexity of the causal chain is no reason to deny it an opportunity to prove causation.

The Court of Appeals erred in concluding as a matter of law that the causal relationship between respondents' price fixing conspiracy and petitioner's payment of higher copper prices was "too remote" to permit the imposition of liability. The determination of causation in this instance is a question of material fact which was disputed by petitioner.

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[47] 631 F.2d at 14, Appendix A at 7a.

The petitioner, who, as the court of appeals concedes, "asserts standing as a competitor of the defendants, directly injured by their conduct[48] should not be denied by summary threshold judgment an opportunity to prove causality. The existence of factual causality has previously been held by this Court to be a jury question and not a matter of law. *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra* note 33.

Reading also undermines this Court's admonitions in other summary judgment cases. In *Poller* v. *CBS, Inc.*, 368 U.S. 464 (1962), this Court cautioned against affirming summary judgments in antitrust cases by drawing inferences from the evidence which should have been reserved for the jury.

Similarly, in *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962), this Court stated that in considering a summary judgment motion, it was the duty of the court to put the best face possible on the evidence from plaintiff's point of view. However, despite *Poller* and *Diebold*, courts in recent years have been granting and affirming summary judgment motions for defendants in complex antitrust litigation with increasing frequency.

Petitioner respectfully submits that given the course of the recent decisional law, the time has come for this Court to reaffirm *Poller, Diebold,* and *Continental Ore*, especially on the issue of causation in fact. The courts below affirmed the existence of a conspiracy and the fact of injury in the market disrupted by the conspiracy but, nevertheless, did not permit the jury to determine whether the injury was caused by the conspiracy. This case then represents the appropriate vehicle to reaffirm this Court's admonition regarding the granting of summary threshold judgment in antitrust and other complex cases.

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[48] 631 F.2d 10 at 12, Appendix A. at 4a.

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 731, Docket 79-7762

Argued April 3, 1980
Decided September 24, 1980

READING INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

KENNECOTT COPPER CORPORATION, *et al.,*
Defendants-Appellees.

Before MANSFIELD and NEWMAN, Circuit Judges, and GOETTEL,* District Judge.

NEWMAN, Circuit Judge:

This appeal concerns a somewhat bizarre attempt to obtain damages under the antitrust laws. Reading Industries, Inc. (Reading) alleges that a conspiracy to keep prices *low* caused it, through a series of complex market interactions, to pay prices that were unduly *high*. The District Court for the Southern District of New York (Morris E. Lasker, Judge) granted defendants' motion for summary judgment on the grounds that Reading lacked standing to sue. 477 F.Supp. 1150.[1] We affirm the judgment for defendants.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

[1] Defendants also moved for summary judgment on grounds that the undisputed evidence available for trial failed to show any viola-

Reading, a refiner of copper scrap and a manufacturer of copper tubing, brought this suit for treble damages under section 4 of the Clayton Act, 15 U.S.C. §15 (1976), against defendants Kennecott Copper Corporation, Phelps Dodge Corporation, and the Anaconda Company, vertically integrated firms, which together produce approximately 60 percent of the refined copper used by the nation's copper fabricators. Reading charged that during the period 1964-1970 defendants conspired to fix the price of domestically refined copper and to monopolize the market for its sale, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1976).[2]

During the 1960's, there were three significant pricing systems for copper. The first was a price quoted by defendants for domestically refined copper; this was known in the industry as the "producers' price." The second consisted of the prices quoted for refined copper on the London Metal Exchange (LME), a futures market significant to fabricators only insofar as many small domestic and the major foreign producers based their copper price on its quotations. The third consisted of the prices quoted in the copper scrap market, in which several hundred independent dealers traded. Reading purchased the copper needed for its fabricating operations in this scrap market. According to the complaint, prices in this market closely followed the LME prices.

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tion and that the decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), foreclosed the action. Judge Lasker rejected these two contentions, though relying in part on the reasoning of *Illinois Brick* in granting defendants' motion. 477 F.Supp. 1150 (S.D.N.Y.1979).

[2] The initial complaint in this complex litigation was filed in 1971, and after seven years of pretrial motions and extensive discovery, an amended complaint was filed on July 9, 1979 because the plaintiff's theory of the case had changed radically over the course of the proceedings.

Between 1964 and 1970, all major domestic producers quoted identical prices, each meeting any price change initiated by another. This producers' price was considerably lower than the LME price throughout the period. The refined copper sold by defendants was thus cheaper than copper available from other sources, including scrap dealers. Acknowledging that they could have charged higher prices and still maintained their level of short-run sales, defendants contended that, acting independently, they set low prices in order to protect long-run sales. This was done, they asserted, to avoid declining demand, a matter of concern because other metals can be readily substituted for copper.[3] Defendants also contended they were responding to governmental pressure for low prices.[4]

The core of Reading's theory of recovery is derived from this complex market structure. Reading contends that the defendants conspired to maintain the producers' price at artifically low levels, well below the LME price, and that this resulted in Reading's paying higher prices in the copper scrap market. The mechanism by which defendants were alleged to affect these two markets was a rationing system that allocated their low-priced copper among customers who demanded more copper at that price than defendants were willing to supply. These customers, who were copper fabricators like Reading, then turned to other markets to meet their copper requirements and were able to "bid up" the price of copper scrap from savings on their purchases of defendants' refined copper. In this respect, Reading argues, although its amended complaint does not allege that it ever purchased or sought to purchase refined copper from defendants, it was injured by

[3] In other words, long-run demand for copper is elastic.

[4] The 1960's was a period of worldwide shortages in copper supply, because of the combined effects of labor and political problems in copper producing countries and sharply surging demand for copper, primarily caused by the heavy defense requirements in Vietnam. *See generally* Y. Levy, *Copper: Red Metal in Flux* 22 (1968) (Federal Reserve Bank of San Francisco Monthly Review Supplement).

their actions because it paid more for copper scrap than it would have paid had defendants not held their prices for refined copper below the market clearing price.

Antitrust law has long recognized that defendants who may have violated a provision of the antitrust statutes are not liable to every person who can persuade a jury that he suffered a loss in some manner "that might conceivably be traced" to the conduct of the defendants. *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 263 n.14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Various doctrines have evolved to delineate categories of circumstances under which losses are not recoverable, even though causally related to an antitrust violation. Unfortunately, the perimeters of these categories are not clearly marked, a consequence perhaps partially due to uncertainty as to whether the pertinent inquiry concerns whether a proper plaintiff is suing or whether a proper claim is being pursued. The inquiry is usually said to concern standing, which implies that the focus is upon the appropriateness of the particular plaintiff, though frequently the nature of the claim is being examined. See Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977). This Circuit has stated that plaintiffs who have suffered injuries causally related to an antitrust violation lack standing if the injury is "indirect or incidental, or if their business was not in the target area of the allegedly illegal acts." *Long Island Lighting Co.* v. *Standard Oil Co. of California*, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert denied*, 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 83 (1976). Neither "direct injury" nor "target area" are concepts that admit of easy application. Both are ultimately tests of whether there is a legally significant causal relationship between the alleged violation and the alleged injury. See II P. Areeda & D. Turner, *Antitrust Law* §334a (1978).

In this case, Reading asserts standing as a competitor of the defendants, directly injured by their conduct. Reading at one point sought damages as a competitor of defendants in the sale of refined copper, but at an earlier stage of this

litigation, dropped the claim of its refining subsidiary.[5] Reading's essential claim is that it was injured as a competitor of defendants in the sale of fabricated copper products, primarily copper tubing. In advancing this claim, Reading is not claiming injury derived from harm to some other party more proximately related to the consequences of the alleged violation. See *Schwimmer* v. *Sony Corp. of America* (2d Cir. July 10, 1980); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1291 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971). Nevertheless, we agree with Judge Lasker that the causal relationship between defendants' alleged violation and Reading's payment of high scrap prices is too remote to permit the imposition of liability.[6]

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[5] This claim was presumably dropped for lack of any facts to indicate that Reading, as a seller of refined copper, was prevented from making sales due to defendants' alleged maintenance of low prices. In fact, as a seller of refined copper, Reading appears to have benefited from the price rise, which it attributes to defendants' conduct.

[6] The standard for review is that of Fed.R. Civ.P. 56(e) for summary judgments; Reading is to be given the benefit of all reasonable doubts in determining whether a genuine issue of material fact exists. *Heyman* v. *Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). While summary proceedings in antitrust litigation are disfavored, *Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), they are not to be read out of the antitrust laws, *First Nat'l Bank of Arizona* v. *Cities Serv. Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-1593, 20 L.Ed.2d. 569 (1968). In *Poller*, the crucial issue was one of motive and intent, which is a question particularly unsuited for judgment on affidavits, but no such issue of motivation is presented in this case. Where the claim turns on documentary evidence and not intent, summary judgment is appropriate. *White Motor Co.* v. *United States*, 372 U.S. 253, 259, 83 S.Ct. 696, 699, 9 L.Ed.2d. 738 (1963); *see also First Nat'l Bank of Arizona* v. *Cities*

Reading's theory of antitrust injury depends upon a complicated series of market interactions between the two sources of copper: the refined copper market in which defendants acted and the copper scrap market in which Reading allegedly sustained injuries. To establish a causal chain, the actions of innumerable individual decision-makers must be reconstructed, including the decisions to purchase additional quantities of copper by fabricators who bought copper from the defendants; the impact of those purchasing decisions on the speculators in the LME market; the pricing decisions of copper end-product users, as affected by the LME price, who sold their consumed copper goods for scrap to scrap dealers; and finally the pricing decisions of the independent scrap dealers who determined the scrap market price that Reading faced.

In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Supreme Court held that no antitrust action could be brought for higher prices paid by an indirect purchaser, who stood at the end of a vertical distribution line extending from the sale of the raw material, where the alleged conspiratorial conduct occurred, to its use in a finished product, which the plaintiff purchased as the ultimate consumer, three levels down the distribution chain. The list of speculative economic behavioral assumptions about the marketplace that the Court found sufficiently remote to invalidate that chain, *id.* at 741-42, 97 S.Ct. at 2072, pales in comparison to those necessary to support Reading's claim.[7] Indeed, to find antitrust damages in this

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Serv. Co., supra, 391 U.S. at 289, 88 S.Ct. at 1592 (where crucial issue of fact is also issue of law, party cannot rest on allegations in complaint to oppose properly supported motion for summary judgment against him).

[7] Reading's economic reasoning is as attenuated as its theory of causality. For example, to argue that scrap prices rose because competing fabricators would pay more due to savings at the lower producers' price ignores the fundamental economic fact that optimal profit-maximizing decisions depend upon marginal cost per unit and not average cost. *See* W. Baumol, *Economic Theory and Operations Analysis* 34-37 (4th ed. 1977).

case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in the market for refined copper on the price of copper scrap, where countless other market variables could have intervened to affect those pricing decisions. The court's task of tracing would be difficult, it not impossible, raising in aggravated form the problem that *Illinois Brick* was intended to avoid. While it is true that *Illinois Brick* holds narrowly only that indirect purchasers may not recover damages for the passing-on of overcharges due to antitrust violations, it has a broader significance in indicating that there are inherent limitations in the substantive protection afforded by the antitrust laws: they exclude claims based on conjectural theories of injury and attenuated economic causality that would mire the courts in intricate efforts to recreate the possible permutations in the causes and effects of a price change. *Cf. Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 583-85 (3d Cir. 1979).

It could be said that Reading, as a purchaser in the scrap copper market, is not in the target area of the defendants' alleged violation in maintaining artificially low prices in the sale of refined copper. Normally, those in the target area of a conspiracy to maintain low prices would be sellers unable to compete at the artificially low prices. In this case, where the alleged conspirators not only maintained low prices but also restricted output, those in the target area could also be purchasers denied an opportunity to buy from the defendants. Reading is not claiming damages in either capacity. Moreover, in the capacity in which it does sue, it predicates its claim of injury on a basis too tenuous and conjectural for a valid causal finding of anticompetitive effect and damages.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT,
S. D. NEW YORK

No. 71 Civ. 1736

September 26, 1979
As Amended November 26, 1979

READING INDUSTRIES, INC., READI-FIN MANUFACTURING COMPANY, INC., and READING METALS REFINING CORPORATION, *Plaintiffs,*

v.

KENNECOTT COPPER CORPORATION, CHASE BRASS & COPPER CO., INC., PHELPS DODGE CORP., PHELPS DODGE INDUSTRIES, INC., SUCCESSOR TO PHELPS DODGE COPPER PRODUCTS CORP., the ANACONDA CO., and ANACONDA AMERICAN BRASS CO., *Defendants.*

LASKER, District Judge.

Reading Industries, Inc., refines copper scrap and manufactures copper tubing. Defendants Kennecott Copper Corporation, Phelps Dodge Corporation, and The Anaconda Company, are large, vertically integrated firms which mine, mill, smelt, and refine copper. Together they produce about sixty percent of the refined copper used each year by the nation's copper fabricators who transform refined copper into intermediate products such as copper wire, rod, sheet, and tubing. Each of the producing defendants also owns its own fabricating subsidiaries, some of which are named as defendants.

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In this suit for treble damages under section 4 of the Clayton Act, 15 U.S.C. §15, Reading charges that between 1964 and 1970 Kennecott, Phelps Dodge, and Anaconda conspired to fix the price of domestically produced refined copper and to monopolize the market for the sale of domestically produced refined copper, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2. Amended Complaint ¶¶ 40-42;[1] Defendants' Brief, Appendix A (letter of May 14, 1979 from plaintiffs' counsel to the court).

The defendants move on three grounds for summary judgment dismissing the complaint. First, they assert that the action must be dismissed on its merits because, despite extensive discovery over eight years, Reading has failed to produce any "significant probative evidence tending to support the complaint." *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968). Second, they argue that under the rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), Reading cannot maintain this action. Finally, they contend that Reading lacks standing to sue under section 4 of the Clayton Act "both because [it] was not a 'target' of [the alleged] conspiracy and because its claimed injury is too remote and indirect to sustain standing." (Defendants' Brief at 4.)

[1] This complex antitrust case was initiated in 1971 but pretrial motions and skirmishes delayed in-depth discovery until about 1977. As a result of that discovery, plaintiffs advised that their theory of the case was radically altered. So different was the plaintiffs' present complaint that the court ordered the plaintiffs to file with it and defense counsel a "Statement of Contentions." That Statement is dated August 29, 1977. After its receipt the court ordered the plaintiffs to propose an amended complaint. That document is dated July 9, 1979. By letter of July 18, 1979 defense counsel objected to certain portions of the amended complaint as inadmissible under the Federal Rules of Civil Procedure. The court invited plaintiffs to respond to the defendants' letter, which the plaintiffs did by a voluminous response dated July 31, 1979. Defense counsel answered the response by detailed letter of August 6, 1979. (footnote continued on next page).

I. The Copper Market[2] And The Theory Of Reading's Case

There are two sources of copper—virgin ore and scrap. Primary production of domestic copper—that is, production of copper from domestically mined ore—is dominated by the defendants, who control sixty to seventy percent of domestic mine production and have augmented their mining hegemony by forward integration through the various phases of copper production, developing substantial smelting, refining, and fabricating capacity. Secondary copper production—the recovery of copper scrap—consists of two elements: recirculation of "new" scrap (defective castings, clippings, punchings, turnings, borings, skimmings, drosses, slags, and other scrap generated in the course of manufacturing copper items) and "old" scrap (obsolete, damaged, or discarded articles such as old pipe, spent cartridge casings, automobile radiators, and lithographic plates). Much new scrap is apparently returned by manufacturers directly to the copper fabricator from which the copper sheet, wire, rod, or tubing used in the

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In a separate ruling of this date, we have sustained the defendants' objections to (1) inclusion in the amended complaint of material expanding the scope of conspiracy to include co-conspirators not named as defendants and (2) inclusion of material relating to alleged fraudulent concealment of the conspiracy. Moreover, we have specified that allegations increasing damages from $18,000,000. to $61,000,000. must be particularized. The information contained in this note is given as background. Our ruling dismissing the complaint would not be different if the proposed amended complaint were accepted as tendered.

[2] The discussion of the copper market in this section of the opinion is based primarily on the descriptions in the parties' briefs on this motion and on Y. Levy, Copper: Red Metal in Flux 53-54 & passim (1968) (Federal Reserve Bank of San Francisco Monthly Review Supplement), and A. McMahon, Copper, A Materials Survey 253-55, 259-60 & passim (1964) (U.S. Bureau of Mines Information Circular 8225), which were submitted to the court by the defendants, and the opinion of the court in *United States* v. *Amax*, 402 F.Supp. 956 (D.Conn.1975), which is cited by the plaintiffs.

manufacturing process was originally purchased, and does not pass through the "scrap market." Old scrap, and whatever new scrap does enter the market, is collected by several hundred scrap dealers or merchants who accumulate it and sell it to smelters and refiners.

During the period 1964 to 1970 there were three significant pricing systems for copper. The first was that employed by the major domestic producers, including Kennecott, Anaconda, and Phelps Dodge (and, until 1966, by many foreign producers), who quoted a non-negotiated price (known in the industry as the "producers' price") which remained in effect until a new price was quoted. Between 1964 and 1970, all the major domestic producers quoted identical prices, and any price change announced by one producer was, for all practical purposes, immediately matched by the others. The second pricing system was the London Metal Exchange (LME). The LME is primarily a hedgers' or speculators' market, seldom used to secure the actual delivery of copper. Its importance lies in the fact that many smaller producers, (and the major foreign producers after they abandoned the producers' price in 1966), based their prices on the LME quotations. The third pricing system was the scrap market, which consisted of several hundred independent dealers whose prices, according to Reading, were "tied to, tracked and established in the open market relative to the LME price." (Amended Complaint ¶ 31.) Reading alleges that the LME and the scrap market were "open markets," which Reading defines as "competitive pricing mechanisms for copper established by buyers and sellers as a function of supply and demand, including, but not limited to, the LME, the New York Commodity Exchange ("COMEX"), and the dealers market for scrap." *Id.* ¶ 28.

Reading further alleges that "[d]uring the period 1964-1970, the U.S. producers' price, the LME price and the scrap price were interrelated, and [that] under competitive conditions, the U.S. producers' price should have approximated the LME price." *Id.* ¶ 32. In fact, however, between

1964 and 1970 the producers' price was well below the LME price: during this period, refined copper sold by Kennecott, Phelps Dodge, and Anaconda (at the producers' price) was considerably cheaper than refined copper available from other sources, including independent refiners and scrap dealers. Reading alleges that this was so only because the defendants conspired to keep the producers' price low, and that in furtherance of this conspiracy they chose to ration their available copper among favored customers rather than raise their prices to clear the market. The defendants acknowledge that each of them could have charged higher prices without losing sales in the short run, and that each of them did ration supplies among its customers, but they argue that each acted independently in refraining from raising its prices, in order to protect long term sales. In short, they argue that their conduct, though parallel, was non-collusive. If this is so, they are not accountable under the law for the effects of their actions, no matter how adverse to others. If, on the other hand, as Reading charges, the defendants' pricing behavior reflected a "contract, combination, or conspiracy" to restrain trade, or monopolize a market by fixing prices, they violated the Sherman Act. *See Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); L. Sullivan, Antitrust Law 210-13 (1977).

To prevail in this suit, however, Reading must establish not only that the defendants violated the antitrust laws, but also that Reading was injured "by reason of" their violation. 15 U.S.C. §15. Reading does not contend that as a consequence of the defendants' pricing behavior it was injured in its capacity as a copper refiner. Rather, it alleges that it was injured as a purchaser of copper for its fabricating operations. Reading did not purchase copper from the defendants, nor could it allege injury if it had, since the gravamen of its complaint is the claim that the defendants sold copper at ar-

tificially low prices. Reading purchased copper primarily from scrap dealers, and the basis for its claim of injury is that because the defendants held down the price for their refined copper, which constituted about sixty percent of the refined copper available in the domestic market, the price for the other forty percent of the available copper, including the price for the copper scrap which Reading purchased, rose to artificially high levels. That is, Reading contends that it was injured because, as a direct result of the alleged conspiracy by the defendants to maintain a low producers' price for copper, it was forced to pay more for the copper scrap it purchased from scrap dealers than it would have had to pay in the absence of the conspiracy.

Despite Reading's voluminous submissions on this motion, it is not entirely clear what Reading considers to be the underlying economic mechanism responsible for the alleged effect of a low producers' price on "open market" copper prices.[3] The Report of Plaintiff's Economic Expert, submitted as an addendum to Reading's brief in opposition to the present motion, states that:

> "The defendants' maintenance of an artificially low price for refined copper had three important consequences for the copper markets: (a) the defendants ra-

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[3] In ¶ 44 of the Amended Complaint, Reading alleges:

> "44. The aforesaid combinations and conspiracies in violation of Sections 1 and 2 of the Sherman Act had the following effects among others:
>
> "a. Created a gap between the U.S. producers' price and the price of copper traded on open markets in which the U.S. producers' price was for the period 1964-70 significantly lower than the price of copper prevailing on the open markets during the same period;
>
> "b. Caused dislocations in the normal supply and demand relationships of the copper market and corresponding hardships for domestic fabricators, including Reading, and resulted in distortions in the domestic copper market;
>
> "c. Resulted in an artificially low U.S. producers' price which in turn caused the price for copper prevailing on open

tioned the supplies of domestic copper that were 'available' at the producer price; (b) some semifabricators, who historically had derived a large percentage of their copper from defendants, experienced a serious shortage; and (c) the demand for copper that could not be satisfied by the defendants spilled over into other markets, causing the prices to rise in those markets."[4]

The critical predicate of Reading's economic argument appears to be the fact, accepted by the defendants (at least for the purposes of this motion), that in order to maintain the low producers' price in the face of excess demand for copper at that price, the defendants rationed their supplies of copper.[5] As a consequence, fabricators who did purchase refined copper from the defendants at the producers' price were not able to purchase as much copper as they might have

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markets, including the dealer market for scrap, to reach artificially high premium levels. This would not have occurred but for the artificially maintained, low U.S. producers' price;

"d. Created an artificial demand for, and shortage of, U.S. producers' price copper and forced domestic fabricators, such as Reading, to purchase their requirements of copper at the artificially high open market prices;

"e. Created a substantial disparity in the raw material costs of copper for domestic fabricators by allocating lower U.S. producers' price copper to preferred and selected customers of the Defendants while forcing the remainder of the domestic fabricators, such as Reading, to purchase their copper requirements at the artificially higher open market prices; and

"f. Had the direct effect of limiting competition by smaller U.S. mine producers by restricting the amount of copper that would have been available but for the artificially low U.S. producers' price."

[4] Addendum to Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Report of Plaintiffs' Economic Expert at 94.

[5] In ¶ 43 of the Amended Complaint, Reading alleges that

"[i]n formulating and effectuating [the alleged conspiracy], Defendants . . .

(i) Allocated the available output of refined copper production to preferred customers; . . . ."

wished. Reading's argument appears to be that when these fabricators turned to alternate domestic sources, such as the scrap market, to purchase the complement of their needs, they were willing and able to bid up the price of copper available from those alternate sources precisely because they had secured a portion of their requirements at the low producers' price.[6] In short, Reading argues that these fabricators were able to pay, and did in fact pay, a premium price for the copper they purchased from alternate sources, such as scrap dealers, because they had realized savings on their purchases of relatively cheap copper from the defendants, that as a consequence the price for scrap copper rose to a higher level than it would have had the defendants not held the producers' price low, and that Reading was injured as a result to the defendants' allegedly illegal action.

Although the defendants do not agree with Reading's assertion that "open market" prices for copper, including the price for copper scrap, rose to higher levels than they otherwise would have had the defendants not held their prices for refined copper low, they do not dispute it on this motion. Rather, they take the position that even if Reading's analysis is correct, they are entitled to summary judgment dismissing the complaint. We have discussed Reading's thesis only because any consideration of the second and third branches of the defendants' motion for summary judgment requires an understanding of the purported causal link between the alleged antitrust violation and Reading's alleged injury. For the purposes of this motion, then, we assume that (whatever Reading's precise economic argument may be) Reading and the other firms that did not have access to the defendants' copper did pay more for copper than they would have had the defendants not held their prices at levels which failed to clear the market.

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[6] *See* Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 393 ("[C]ertain United States fabricators, having substantial allocations of lower U.S. producers' priced copper, could afford to and did 'bid-up' the price on the open markets.").

II. Evidence Of Combination Or Conspiracy

Acceptance of Reading's assumption, however, does not end the matter. To prevail in this action Reading must prove not only that it was injured because the defendants held the producers' price at an artificially low level, but also that in doing so the defendants violated the antitrust laws. Reading's theory of causation purports to explain only how the market translated a low producers' price into a high scrap price—it says nothing as to how the low producers' price came about in the first place. Only if the defendants acted collusively are they liable under the Clayton and Sherman Acts. They argue that they are entitled to summary judgment dismissing the action on the merits because there is no evidence suggesting that they acted in concert or otherwise violated the antitrust laws in connection with their pricing decisions.

It is a legal commonplace that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted). This is the paradigm of cases to which the Supreme Court's admonition is addressed. The historical facts here are not in dispute: the defendants do not deny that they quoted identical prices for refined copper, and resisted "market pressures" to raise their prices. The key, indeed the sole, issue, is whether in doing so they acted jointly or independently. Thus, proof that the defendants violated the antitrust laws will not turn on what happened, but rather on why it happened. Nonetheless, the defendants contend that this is a case in which summary judgment dismissing antitrust claims on the merits is warranted.

The rule is that if the party moving for summary judgment shows conclusively that the factual allegations of the complaint are not susceptible of any interpretation suggesting that the defendants violated the antitrust laws, the opposing

party may not rely on those allegations, but must produce "significant probative evidence tending to support the complaint" if it is to avoid summary dismissal of the action. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968); *United States* v. *Pent-R-Books*, 538 F.2d 519, 529 (2d Cir. 1976); *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110-11, (2d Cir. 1975); *Weit* v. *Continental Illinois National Bank and Trust Co.*, 467 F.Supp. 197, 208 (N.D.Ill. 1978). The defendants argue that application of this rule requires summary dismissal of this action. However, their argument does not carry the day. Summary judgment is not appropriate here because the defendants have not shown that Reading's factual allegations will not support an inference that the defendants violated sections 1 and 2 of the Sherman Act. Moreover, as indicated below, Reading has come forward with evidence which does tend to support its contention that the defendants violated the antitrust laws, evidence which would suffice to defeat this branch of the defendants' motion even if the defendants had met their initial burden.

The defendants have concentrated their efforts on demonstrating that each of them had legitimate reasons to hold down the price of copper. While this may be so, the question is not whether the defendants had legitimate reasons for their action, but whether they acted in concert, and here the legitimate business reasons which the defendants suggest motivated their actions do not defeat the possibility that the defendants acted collusively. The defendants have submitted extensive evidence that during the period in question—1964-1970—each of them was concerned that high copper prices would lead their customers to substitute other materials (such as aluminum or plastic) for copper; each was under government pressure (in the form of jawboning) to keep prices down to curb the inflation spawned by the Vietnam war, and each was subject to leverage from large customers who frowned on price increases. This showing, however, does

not exclude possible inferences of combination or conspiracy; it simply suggests alternate incentives to conspire. That each of the defendants had independent motives for holding the price of copper down does not negate the possibility that they acted together to effect them. Despite the volume and quality of the defendant's submissions on this point, they have failed to demonstrate that the undisputed facts are not susceptible to the interpretation that they violated the Sherman Act.

Because of their failure to do so, Reading was under no compulsion to come forward on this motion with evidence in support of its claims. Nonetheless, Reading has identified a number of factors which dictate that summary dismissal of its complaint would be inappropriate even if the defendants had made the conclusive showing required by *First National Bank* v. *Cities Service Co.* In particular, Reading points to the undisputed structural characteristics of the copper market and the defendant firms, and argues that inferences of combination and conspiracy sufficient to defeat the defendants' motion for summary judgment can be drawn from these alone. In a highly concentrated, vertically integrated interdependent industry protected from outside encroachment by enormous startup costs and limited supplies of the basic commodity (copper ore), opportunities for collusion are extensive and the potential benefits to be realized great. When there is in addition evidence, as there is here, of consciously parallel conduct, as well as evidence of common motives for such conduct, strong inferences of collusion are permissible.[7] At trial

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[7] *See Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939); R. Posner, Antitrust Law: An Economic Perspective (1976); L. Sullivan, Antitrust Law 354-64 (1977); Turner, Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655 (1962); First, Book Review, 52 N.Y.U.L.Rev. 947 (1977).

the jury might or might not find such inferences compelling, but on this motion for summary judgment, Reading is entitled to the benefit of those inferences.[8]

In sum, even the defendants' view of the facts does not undercut Reading's allegations of conspiracy, and in addition Reading has adduced evidence "tending to support" them. Accordingly, this branch of the defendants' motion for summary judgment must be denied.

III. The Rule Of Illinois Brick Co. v. Illinois.

As an alternate ground, the defendants urge that Reading's suit must be dismissed under the rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). In addressing the defendants' argument on this point, it is important to distinguish between the Supreme Court's holding in *Illinois Brick* and the rationale which the Court expressed for its holding. The holding of *Illinois Brick* was that, with few exceptions, an indirect purchaser cannot maintain an action against a price-fixer to recover overcharges passed on to the indirect purchaser as the price-fixer's product moved through the chain of distribution. To state this holding is to demonstrate that it has no application to the facts of this case, which does not involve overcharges, indirect purchasers, or a vertical chain of distribution linking plaintiff and defendant. To apply the rule of *Illinois Brick* to the circumstances of this case would be to transmute the decision beyond recognition.

However, although the *rule* of *Illinois Brick* has no application to this case, the *rationale* for the rule has direct relevance.

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[8] "[A]ll of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it . . . [I]t is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' " *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-01, 82 S.Ct. 1404, 1411, 8 L.Ed.2d 777 (1962) (quoting *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944)).

There were two grounds for the Supreme Court's decision articulated in *Illinois Brick*. The first was the need to foreclose the possibilities of mutliple recovery against defendants that might ensue were indirect purchasers permitted to sue on a "pass on" theory. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), the Court had held that an alleged price-fixer could not interpose as a defense to a treble damages action brought by a direct purchaser the claim that the plaintiff had suffered no injury because it had passed on to its own customers any illegal overcharges it paid. If the rule of *Hanover Shoe* were to continue unchanged, and indirect purchasers were nonetheless allowed to sue on a pass on theory, defendants would find themselves liable to direct purchasers for the entire amount of any overcharge paid by that purchaser, and also liable to indirect purchasers for that portion of the overcharge that was passed on to them. To avoid such multiple liability, the Court chose to bar suits by indirect purchasers rather than modify or overrule its earlier holding in *Hanover Shoe.*

In determining whether or not to modify its earlier holding, the Court reexamined the grounds for the *Hanover Shoe* decision, and concluded that the "principle basis for the decision in *Hanover Shoe*,"—the

> "perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damage proceedings"—

applied with equal force in the circumstances of *Illinois Brick*, since it is no easier for a plaintiff to demonstrate how costs filter through a chain of distribution than it is for a defendant. 431 U.S. at 731-32, 97 S.Ct. 2061 at 2068. This was the second, and more crucial, ground for the Court's decision in *Illinois Brick.*

The perception that efforts to analyze and explicate the vagaries of the market-place must necessarily create enormous difficulties in the trial and decision of antitrust suits is markedly relevant here, where the core of Reading's case—the link between the alleged antitrust violation and the injury Reading claims it suffered because of that violation—is an economic theory about the reverbations in one part of the copper market caused by a constraint in another part of that market. Trial of this case would surely involve "the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model' and . . . the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom," 431 U.S. at 731-32, 97 S.Ct. at 2068 (footnote and citation omitted) (quoting *Hanover Shoe*, 392 U.S. at 493, 88 S.Ct. 2224), which it was the Supreme Court's central concern to minimize in *Illinois Brick*. While this alone is not enough to warrant extension of the narrow holding of *Illinois Brick* to circumstances radically different from those to which it was addressed, it does counsel special sensitivity to the difficulties and dangers inherent in attempts to trace the causal link between economically remote antitrust violations and injuries. Such sensitivity is crucial to an adequate consideration of the final branch of the defendants' motion, which raises the question whether Reading has standing to sue for treble damages under section 4 of the Clayton Act. *See Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 582-87 (3d Cir. 1979).

IV. Standing

Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue to recover "threefold the damages by him sustained" 15 U.S.C. §15. As the Supreme Court has noted, however, the federal "courts have been virtually unanimous in concluding that Congress

did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 4, 92 S.Ct. 885, 881 n. 14, 31 L.Ed.2d 184 (1972). The decision in *Illinois Brick*, for example, is one instance in which the Supreme Court has recognized limits to the right to sue for damages based on injuries sustained, at least in part, because of a violation of the antitrust laws. More generally, the lower federal courts have acknowledged such limits in formulating rules limiting plaintiffs' standing to sue for treble damages under section 4.

The reasons for these rules have been throughly canvassed. *See, e.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971) *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972); Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 845-58 & passim (1977). By limiting the availability of the treble damage remedy, the courts seek to limit the potential for multiple recoveries, to avoid disproportionate damage awards that threaten to debilitate or ruin defendants (with possible anticompetitive effects), to curb *in terrorem* suits that encumber the judicial infrastructure, and to minimize the difficulties and speculation encountered at trial in the proof of injury and calculation of damages. In general, the courts have restricted standing to those whose injury is, to a greater or lesser degree, a "direct" consequence of the alleged antitrust violation. The difficulty in each case, of course, lies in discriminating with precision between "direct" and "indirect" injury.

The rule in the Second Circuit is that "a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act." *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d 1970) *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971). Though the Second Circuit has sought to elucidate this standard in a number of cases, the line delimiting

the "target area" of an antitrust violation has not yet been definitively drawn, and indeed may not be capable of precise definition.[9]

In *Billy Baxter*, the plaintiff, who franchised independent bottlers of a line of soft drinks, charged various manufacturers of competing soft drinks with violating the antitrust laws in an effort to drive the plaintiff's franchisees out of business. The plaintiff alleged that as a consequence its franchisees' profits had been reduced, and its own revenues had suffered accordingly. The court concluded that the franchisor did not have standing to sue because it was "one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct." *Id.* at 188.

In a subsequent case, *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971) *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972) the rule was extended. There the plaintiff rented theatres to the defendant, a motion picture exhibitor. The complaint charged the plaintiff's tenant with conspiring with others to restrain the trade of competing motion picture distributors and exhibitors, and asserted that in furtherance of the conspiracy the tenant exhibited less profitable films in the theatres it rented from the plaintiff than it otherwise would have. This indisputably injured the plaintiff because the rent paid was based in part on the tenant's gross receipts. Nonetheless, the court held that the landlord did not have standing:

> "[T]his court has committed itself to the principle that in order to have 'standing' to sue for treble damages under §4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i. e., a

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[9] For a recent discussion of the Second Circuit's antitrust standing decisions, see *Laurie Visual Etudes, Inc.* v. *Chesebrough-Pond's Inc.*, 473 F.Supp. 951 (S.D.N.Y. 1979) (Weinfeld, J.).

> person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves."

Id. at 1295. The court noted that a "line which limits standing to those against whom the antitrust violation is directed . . . establishes a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the floodgate to all, no matter how remote their interest or incidental their relationship." *id.* at 1296 (footnote omitted). Subsequent cases, however, and the present one, demonstrate that the "cut-off" is not always so "easily identifiable" as might be wished.

In *Long Island Lighting Co.* v. *Standard Oil Company of California*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 83 (1976) (*LILCO*), Judge Gibbons (siting by designation) noted that "the line between plaintiffs with standing and those who lack it may not in every case seem perfectly plain." *Id.* at 1274. In *LILCO*, the plaintiffs were two public utilities who sued three oil companies, charging that the oil companies had organized a joint boycott of Libyan oil in an effort to dissuade the Libyan government from nationalizing their oil concessions. Pursuant to the boycott, the oil companies refused to honor contracts requiring them to deliver Libyan crude oil to the independent refiner who was the plaintiffs' chief source of low sulphur heating oil. The refiner was forced to negotiate new supply contracts directly with the Libyan government, on terms less favorable than its contracts with the defendant oil companies. In addition, the oil companies refused to ship Libyan oil, and as a result the refiner incurred increased transportation costs. The refiner's increased costs were passed on to the plaintiff utilities. It is clear that the utilities' costs were increased sharply as a result of the allegedly illegal boycott of Libyan oil. Judge Gibbons noted that "[i]t was foreseeable, certainly,

that in the short run this boycott would have some effect, possibly adverse, on the business or property" of the plaintiffs, but concluded that nevertheless they lacked standing to sue in the circumstances.

> "[The utilities] were not the objects of the alleged antitrust violation. Their injuries were the result of their relationship to [the refiner], an intermediate non-target. The cases recognize that suppliers, stockholders, employees, landlords, franchisors, licensors, and consumers are too remote for Clayton Act standing. The instant plaintiffs, customers of a non-target, are at least equally remote."

Id. at 1274 (footnotes omitted.)

From the opinions in these cases two factors emerge as tests for the standing of antitrust plaintiffs: First, the plaintiff's status, and second, the plaintiff's proximity or remoteness from the center of the alleged conspiracy. Thus, as to status, in each case the plaintiff which was held to lack standing suffered injury which was "derivative", that is, one suffered not because of the plaintiff's role in the market but because of its status as a "creditor, stockholder, employee, subcontractor, or supplier of goods and services," *Calderone*, 454 F.2d at 1295, or something of the like (franchisor in *Billy Baxter*, landlord in *Calderone*, and customer in *LILCO*). As to proximity or remoteness, the injury of the plaintiff in the cited cases was found to be several steps removed from the immediate impact of the alleged violation.

While each of the cases touches on both of the factors mentioned, none of the opinions suggests that one or the other of the factors is a *sine qua non* to the determination that a plaintiff lacks standing. We conclude that the rule of the cases is that a plaintiff lacks standing to sue if he either fails the "status" test or the "proximity-remoteness" test. That is to say, the cases teach that if the plaintiff's status is "derivative" within the meaning of the doctrine *or* the plaintiff's position is remote from the center of the alleged conspiracy, the plaintiff lacks standing to sue. The question then is whether Reading passes both tests. We agree that since

Reading's alleged injuries, no matter how remote, were suffered "in the market" as a consequence of market interactions and economic adjustments to the defendants' behavior, Reading may well have standing on the basis of the "status" test. Nevertheless, we conclude that whatever Reading's standing under the "status" test, it does not have standing as defined by the "proximity-remoteness" test. In our view, Reading's claim that its injury was caused by the defendants holding down prices, which in turn is claimed to have raised prices on the LME and in the scrap market, which in turn required Reading to pay prices higher than it otherwise would have is too remote to fall within the "target area" as described by the Second Circuit cases. The causal chain at issue here is at least as involved and tenuous as those in *Billy Baxter*, *Calderone*, and *LILCO* where the plaintiffs were found to lack standing. Accordingly, we conclude that like those plaintiffs, Reading lacks standing to sue.

As was true in another recent case in which antitrust plaintiffs were found to lack standing, our conclusion is strengthened by the Supreme Court's decision in *Illinois Brick*. *See Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). As noted earlier, the Court expressed in *Illinois Brick* its concern about the difficulties inherent in any attempt to prove the impact of a defendant's activities by tracing the economic adjustments and market interactions caused by those activities, and the danger of duplicative or ruinous recovery that often accompanies such attempts. Both are endemic here. Trial of this action would clearly be complicated by the necessity of pursuing "complex and conjectural economic lines of causation and effect," *id.* at 583, and the potential for duplicative and ruinous recovery against the defendants is enormous, since if Reading has standing to sue, every other individual or firm who purchased copper during the period 1964-70 at prices artificially elevated as a consequence of the alleged price-fixing conspiracy must have standing as well. In these circumstances, a decision that Reading has standing to sue could not be lightly taken.

The subject at hand is acknowledgedly complex and the arguments in support of Reading's position are respectable. Nevertheless, we conclude that the thrust of the Second Circuit cases, supplemented by the momentum of *Illinois Brick*, dictates the conclusion that Reading lacks standing to sue. The complaint is dismissed.

It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of December, one thousand nine hundred and eighty.

79-7762

READING INDUSTRIES, INC., *Plaintiff-Appellant*,

-against-

KENNECOTT COPPER CORPORATION,
et al., Defendants-Appellees.

Filed December 29, 1980

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Reading Industries, Inc.,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk